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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1953

No. 638

POTLATCH OIL & REFINING COMPANY, a Corporation, and JEAN P. GERLOUGH, STANLEY H. HODGMAN and ROY E. LARSON, as Trustees of That Certain Trust Known as Inland Empire Oil and Gas Syndicate, A Common Law Trust,

Petitioners,

vs.

THE OHIO OIL COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioners Potlatch Oil & Refining Company, a corporation, and Jean P. Gerlough, Stanley H. Hodgman and Roy E. Larson, as Trustees of that certain Trust known as Inland Empire Oil and Gas Syndicate,

a Common Law Trust, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on October 30, 1952 (R. 661, 662) affirming the judgment of the District Court of the United States for the District of Montana, Great Falls Division, (R. 157, 158). Petition for rehearing was filed, within time, December 2, 1952, in the Court of Appeals and on December 3, 1952, was denied (R. 662).

I. SUMMARY STATEMENT OF MATTER INVOLVED

Petitioners, filed this action in the District Court of Montana, for the County of Toole, to obtain an accounting and payment from respondent for petitioners' share of oil and gas proceeds from a 320 acre tract of land alleged to have been wrongfully withheld by respondent in the course of developing and operating a tract of land under a written operating agreement (complaint R. 4-26). The case was thereafter removed to the United States District Court for the District of Montana on the ground of diversity of citizenship and the amount in controversy being in excess of $3,000.00 exclusive of interest and costs (R. 26-33). Upon a trial judgment was rendered in favor of respondent denying the accounting sought (R. 157). Petitioners appealed to the United States Court of Appeals, Ninth Circuit (R. 158). The Court of Appeals affirmed the judgment of the District Court October 30, 1952 (R. 661). Petition for rehearing was denied December 3, 1952 (R. 662).

On June 15, 1922, Troy-Sweetgrass Oil Syndicate, a common law trust, hereinafter referred to as "Troy"

assigned to The Ohio Oil Company (hereinafter called "Ohio"), by written assignment, an undivided 55% interest in written oil and gas leases on lands in Toole County, Montana, among which was an oil and gas lease of land known as the "Baker Lease" of approximately 320 acres of land (R. 23, 24), being the lease involved in this cause. On the same date, as a part of the same transaction Troy and Ohio entered into a written "Operating Agreement" pertaining to the leases (R. 17-22), whereby Ohio was given the control and management of the leased lands. Ohio assumed and remained in exclusive possession and control of the land from about June 15, 1922 to and including January 31, 1943, at which latter date it sold and conveyed all of its interest in the Baker Lease and equipment to The Texas Company (complaint, R. 8, 9, answer R. 54).

January 1, 1923, Troy conveyed ½ of its 45% interest in the Operating Agreement, so far as it pertained to the Baker Lease, to petitioner, Inland Empire Oil and Gas Syndicate (hereinafter referred to as "Inland") and notice thereof was given to Ohio about June 2, 1923 (complaint R. 10, answer R. 54). August 18, 1923, Troy conveyed all of its remaining interest in the operating agreement to petitioner, Potlatch Oil & Refining Company, hereinafter referred to as "Potlatch" (complaint para. IX R. 10, answer para V R. 54). Thereafter the interests of respective parties in the Baker Lease and operating agreement on the 320 acres was Potlatch 22½% Inland 22½%, and Ohio 55% (until it sold its interest to the Texas Company).

As a result of Ohio's operations oil was obtained

on the land commencing in the year 1922 and production and marketing by Ohio continued until aforesaid sale of its interest to the Texas Company. Statements were rendered monthly by Ohio purporting to show the oil produced and sold and expenses of the operations and when a statement showed a credit to Potlatch and Inland checks were delivered and cashed by them to a total approximating $250,000 (Stipulation of facts admitted, para. 4, 6, 7, 8, 10 R. 99-102). Ohio accompanied the checks with vouchers reciting substantially the checks were in payment of credit balance shown on the monthly statement.

When the monthly statements of Ohio's operations first started to come in the officers and trustees of Potlatch and Inland objected orally and in writing to the propriety of various charges against them under the operating agreement and because contrary to the intent thereof (R. 518, 519, 440-448). September 11, 1923, R. E. Wilson, President of Inland wrote Mr. Hurley, Vice-President of Ohio, objecting to charges for "depreciation and automobiles", "work on roads off the lease", "cost of buildings and maintaining main Swayze Camp" and "overhead charge of 10% (R. 306-308). Mr. Hurley answered by letter (R. 309) explanatory of Ohio's views and stating "I think our charges are entirely reasonable". July 17, 1925, the attorneys for Potlatch and Inland wrote Ohio directing attention to objections to mode of rendering accounts and that unreasonable, unwarranted charges under the agreement had been made from time to time against Potlatch and Inland and suggested a conference be had to straighten out matters (R. 336-338).

For the purpose of adjusting and settling the objections a meeting was held about August 7, 1925, between representatives of Potlatch, Inland and Ohio and it was agreed that the attorneys for Potlatch and Inland would reduce to writing and send Ohio a statement of items constituting the difference of opinion between them in the interpretation of the operating agreement and the objections of Potlatch and Inland to the accounts of Ohio's operations theretofore rendered. On August 8, 1925, said attorneys reduced the items in dispute to writing and sent the written statement to Ohio (R. 121). This statement appears as EXHIBIT "A" at pages 65 to 73 of the record filed in this Court and enumerates objectionable items and charges, which, briefly are:

1. Expense of construction of Sunhio Water Plant $37,000.00
2. Overhead expense of 10% charged.
3. Field expense.
4. Construction cost of "Main Swayze Camp."
5. Additional credit of 10c a barrel on oil sold to Ohio by Ohio under the terms of the operating agreement to comply with its provision that oil would be paid for at the highest market price at the wells (R. 66-68).
6. Excessive drilling charge of drilling wells (R. 70).

The statement directed attention of Ohio that in the conversations leading up to the signing of the operating agreement Mr. Jones who was President of Troy and others brought up with the representatives of the Ohio the question of what should be included in the costs that could be charged against the Troy and insisted that there should be no charge made against

the said Troy and its successors and in interest, save and except the actual expense incurred on the lease itself as they had been informed that in these operating agreements, unless otherwise provided, charges similar to the ones hereinabove objected to were commonly charged by the operating company, which would be Ohio in this case. It is agreed by the representatives of Ohio that the charges that could be made against the Troy were simply the charges and expenses incurred within the four corners of the lease. Afterwards, when said written agreement was brought back for the purpose of being signed, Mr. Jones had his attention called to the following phrase in said written agreement:

> "But in no case shall said party of the First Part be finally held or charged beyond its share of interest in the production and equipment from, in or upon said lands";

and after reading the same, they believed that it conveyed the meaning which they had heretofore agreed upon in the oral negotiations that this phrase would only permit the Ohio Oil Company to charge against the Troy and its successors in interest the charges and expenses of production and equipment that should be incurred on, in or upon said land; and in consequence of which, Mr. Jones signed said agreement, as President and Mr. Harsh attested the same, as Secretary of Troy (R. 68, 69).

September 12, 1925, Ohio replied by letter (R. 122) to the said statement and which letter appears at pages 73-89 of the record and sets forth reasons why Ohio believed the objections of Potlatch and Inland were not well founded.

Thereafter, in the year 1926, T. P. Jones, President of Potlatch, and a trustee of Inland met John McFadyen, General Manager of Ohio's operations, on the street in Shelby, Montana, and talked with him and told him that "if he didn't correct these things and make an accounting they would have to enter suit against Ohio." McFayden said, "don't start no suit because The Ohio Oil Company is responsible and reliable, and eventually in the final account we will fix this thing up and pay you anything that was overcharged against you. You can rest assured of that. The Ohio Oil Company is responsible and reliable." McFayden said, "I will use my efforts to see that it is brought to a head without suit" (R. 447, 448, 96, 97). As a result of McFayden's statement to Jones no suit was started and Jones informed his directors and trustees what McFadyens said (R. 448, 449, 234-236).

Ohio without any prior notice to petitioners sold its interest in the Baker Lease, equipment and operating agreement to The Texas Company (R. 229, 230) and failed to make any settlement and accounting promised by General Manager McFadyen, or otherwise (R. 236, 237).

This cause was filed March 18, 1947, by Potlatch and Ohio seeking a correct accounting and payment by Ohio of the proceeds of oil wrongfully withheld by Ohio by way of reimbursement for expenses it alledgedly incurred under the terms of the operating agreement, a copy of which is set forth as "Exhibt A" in the complaint (R. 4-25). The complaint substantially alleges, so far as pertinent:

1. The making of the assignment and operating

agreement between Troy and Ohio annexed as Exhibits "A" and "B" to complaint and that prior to their reduction to writing it was expressly orally agreed between the parties that the share of Troy of the expenses incident to the drilling, development and operations of the lands would be restricted and limited exclusively to the cost of the actual drilling itself of the wells, except cost of first well drilled was to be borne solely and wholly by Ohio, and the placing of the wells in condition to deliver the oil and gas at their locations on the land plus the actual cost of the equipment located wholly within and upon the lands and the actual cost of installation, repairs and replacements of such equipment and that all other costs of operating said lands and producing and marketing the production would be the sole expense of and wholly chargeable to Ohio (R. 5-7);

2. That Ohio promised to reduce said oral agreements to formal written agreements to be signed by the parties as evidence of said oral agreements and thereafter Ohio prepared the said written assignment and operating agreement and prior to signing Ohio directed the attention of Troy to the following express provision of paragraph III of the operating agreement, to wit, "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from in or upon said lands" as expressing the said oral agreement limiting and restricting the expenses chargeable against Troy and at the time Ohio stated and represented to Troy that the purpose of such express provisions was to express the intent to limit expenses

chargeable to the cost of the actual drilling itself of the wells at their locations on said lands except the expense of the drilling of the first well which was to be borne solely and wholly by the Defendant, and the placing of said wells in condition to deliver the oil and gas production therefrom at their respective locations upon land plus the actual cost of the equipment located whilly within and upon the said lands and the actual cost of the installation of said equipment and repairs and replacement of said equipment and that all other costs of operating said lands and producing and marketing the oil and gas therefrom would be the sole expense of and wholly chargeable to the Defendant alone. (R. 7, 8)

3. Ohio took possession and control of the lands on or about June 15, 1922 and thereafter maintained sole and exclusive possession, management and control of the lands and equipment, discovered oil and gas in commercial quantities and continued operating, developing and drilling of the lands until about January 31, 1943, when Ohio sold, assigned and conveyed all of its interest to The Texas Company (R. 8,9);

4. That Troy in the year 1923 sold to Potlatch and Inland a 22½% interest, each, in the lands and the operating agreement as to the "Baker Lease" (R. 10, 11);

5. That all proceeds from marketing of oil produced was received by Ohio and contrary to the express operating agreement Ohio improperly held and improperly charged Potlatch and Inland beyond their share and interest in the production and equipment from in and upon the lands during the period of

Ohio's possession and operation thereof and deducted from the shares of Potlatch and Inland of the proceeds of oil and gas marketed from the lands monies representing items of expense that in no manner represented cost of actual drilling itself of the wells or actual cost of equipment in or upon said lands, or actual costs of installation of said equipment or repairs or replacement of said equipment and in addition thereto, Ohio improperly charged the shares of Potlatch and Inland in the proceeds of oil and gas with interest at the rate of eight (8%) per cent per annum of the amounts of said excessive and unreasonable charges; and Ohio also improperly, erroneously and wrongfully charged Potlatch and Inland, as alleged, "overhead expenses" of Ohio, a sum of money equal to approximately 4½% of the total amount of money which Ohio claimed it had expended in attempting to perform the terms of said "Operating Agreement" (R. 12, 13).

6. Ohio purchased and appropriated all oil produced to its own use and allowed Potlatch and Inland credits for their shares of the oil amounts varying from 10c to 20c a barrel below the prevailing market price of the oil at the wells specified in the operating agreement thereby depriving Potlatch and Inland of their just shares of the proceeds of the oil in an exact amount unknown to them and known to Ohio (R. 13);

7. Potlatch and Inland directed attention of Ohio to said improper and erroneous charges and credits and was promised that all erroneous and improper charges made at any time would be recitfied and payment

made therefor upon a correct, full and final accounting which Ohio promised it would later make and render and which it wholly failed to do notwithstanding demand that it do so was made by Potlatch and Inland and that upon a true and correct accounting by Ohio there will be found to be due Potlatch in excess of $195,000 and due Inland in excess of $175,000; that Potlatch and Inland respectively, have performed all terms, conditions and provisions of the operating agreement and assignment upon their part to be performed (R. 13-15).

Ohio substantially answered the complaint as fol lows:

1. Admitted the making of the operating agreement and assignment (R. 53) and Ohio's assuming sole possession and operation of the land and producing and marketing the oil and gas until it sold its interest to The Texas Company, January 31, 1943, and admitted the sales by Troy to Potlatch and Inland, each, of a 22½% interest in the operating agreement and the "Baker Lease" and notice to Ohio of such sales and that the "Baker Lease" lands during Ohio's possession produced oil and gas in commercial quantities and was exclusively marketed by Ohio (R. 53, 54).

2. Admitted Potlatch and Inland made protests and objections to charges "shortly prior to August 1, 1925, and that a conference was had between the representatives of Potlatch, Inland and Ohio for the purpose of adjusting and settling same and as a result thereof it was agreed the attorneys for Potlatch and Inland would send Ohio a statement of the items constituting the difference of opinion in the interpretation of the

operating agreement and thereafter such written statement was sent, a copy of which is annexed to the answer as Exhibit A and Ohio replied thereto, a copy of which reply is annexed to the answer as Exhibit B. (R. 55, 56) The answer alleges that after the said correspondence there were no other objections made to Ohio's monthly statement of accounts until July 8, 1946, and that during the entire period written monthly written statements were given showing the expense and cost of operating the lands and where a credit was indicated in favor of Potlatch and Inland a remittance therefor was made and accepted without objection to the correctness thereof until July 8, 1946, and said remittances have been retained by Potlatch and Inland and by reason thereof an account was stated between the parties and that same was settled by the monthly payments made (R. 56, 57);

3. The answer denied allegations of improper and erroneous charges and credits, denied any promise of rectification and payment or of a promise of full and correct accounting at a later date, and denied that no full and final accounting had been made and denied that any moneys will be found due to either Potlatch or Inland upon a true and correct accounting had (R. 58, 59).

4. The answer also pleaded that failure of Potlatch and Inland to commence this action until March 18, 1947, and the deaths of F. E. Hurley, Ohio's Vice-President on July 27, 1928, and A. M. Sellery, February 14, 1927, who negotiated the assignment and operating agreement constituted laches to defeat the action (R. 58, 59), and further pleaded the right of

action did not accrue within either five years or eight years before the commencement of the action (R. 59);

5. By way of a fourth affirmative defense Ohio alleged it drilled a commercial well on the Baker Lease and a commercial gas well on the Sindon Lease and that at all times thereafter the Baker Lease has been developed and has produced oil in commercial quantities and monthly statements were rendered Potlatch and Inland by Ohio showing the cost and expenses of developing and operating the lands and amount of oil produced and price sold for and when a credit was shown of oil and gas proceeds over the expenditures Ohio remitted by check therefor and Potlatch and Inland had access to the properties and books at reasonable hours and were duly acquainted with the actual costs and expense of developing and operating the lands. As a part of this affirmative defense Ohio alleged the remittance were received and retained without objection by Potlatch and Inland and by reason of all matters alleged and by their acceptance and retention of payments for oil and gas Potlatch and Inland are ought to be forever estopped from denying the right of Ohio to make the charges and expenses and deductions set forth in the monthly statements and ought to be estopped from claiming or demanding reimbursement for such deductions and from asserting any indebtedness owing from Ohio. Attached to the answer as Exhibit C. is a copy of statement rendered by Ohio for June, 1927, to Potlatch and it is alleged a similar statement was furnished to Inland, that similar monthly statements were thereafter ren-

dered and the total amount remitted by Ohio equalled or exceeded $250,000 (R. 59-65).

Trial was held in the United States District Court December 22d and 23d, 1949 (R. 160 et seq.). The Court with consent of the parties made an order, substantially, that the following issues be determined by the Court prior to adjudging any accounting in the action.

1. Is evidence of the character of the deposition of T. P. Jones on file in the cause or any similar oral testimony of other witnesses admissible for the purpose of (a) modifying or explaining the terms of the Operating Agreement, copy of which is annexed to the complaint or (b) interpreting the same and if the court find such testimony admissible to further find what the actual agreement was between Troy and Ohio and adjudge the true meaning of the agreement and what costs and expenses of developing the lands incurred by Ohio may be properly chargeable against Troy and successors in interest (R. 128, 129);

2. That the Court determine the merits of the defendant's first affirmative defense of laches to the cause of action stated in plaintiff's complaint (R. 129);

3. That the Court determine the merits of the defendant's second and third affirmative defenses wherein defendant pleads the Montana five-year Statute of Limitations and the eight-year Statute of Limitations in its answer (R. 129);

4. That the Court determine the merits of defendant's fourth affirmative defense wherein it pleads that there was an account stated between the plaintiffs

and defendant by reason of monthly statements rendered plaintiffs by the defendant (R. 129, 130).

After receiving evidence (R. 190-606) the District Court made finding of fact and conclusions of law among which were in substance the following:

Finding of fact No. 4, that the written agreement between Troy and Ohio for the development and of the oil and gas leases described therein is free from amiguity and is clear, explicit and unequivocal in its language, terms and provisions and the Ohio has fully complied with each and all of the obligations imposed upon it (R. 151, 152);

In Finding of Facts 7 among the facts found was that "at no time during the period subsequent to entering into possession and prior to the time that Troy assigned to Inland and Potlatch were any objections ever made by Troy to Ohio with referecne to the accounting which included the same items as subsequent statements of account made to Inland and Potlatch (R. 153 lines 18-25);

Finding of Fact 8, that in 1923, 1925, and 1936 plaintiffs made complaint to Ohio with reference to charges made for expenses of operation and development and in each instance Ohio refused to make any changes in its charges and maintained a continuous and unvarying course of conduct throughout the entire period as established by convincing proof under which it flatly and unequivocally refused to make any change. Ohio during all said period steadfastly maintained that the charges and its accounting were in strict accordance with the written agreement (R. 154);

Conclusion of law No. 1, that the agreement of June 15, 1922, between Troy and Ohio is clear and explicit and the intention of the parties must be ascertained from the agreement alone and it may not be explained by parol evidence or matters outside of and not recited in said written agreement and that T. P. Jones testimony of the alleged remarks by John McFadyen, deceased Manager of Ohio is not admissible for any purpose, that no foundation for such testimony has been made and no injustice will be done by excluding such testimony (R. 155);

Conclusion of law No. 2, that Ohio through a continuous and unvarying course of conduct on its part under the plain requirements of said written agreement since its execution and at all times thereafter during the period questioned in this suit, in all things complied with the clear terms of provisions of the written agreement (R. 155, 156);

Conclusion of law No. 3, that laches in asserting their claims bar plaintiffs from any recovery (R. 156);

Conclusion of law No. 4, that the statutes of limitation of the State of Montana bar plaintiffs from any recovery herein (R. 156);

Conclusion of law No. 5, that Ohio is not a trustee for plaintiffs (R. 156);

Conclusion of law No. 6, that the monthly statements of account furnished by Ohio to Troy, Potlatch and Inland and the acceptance and retention of the moneys paid to them respectively by Ohio with knowledge that Ohio repeatedly refused to make any changes in its accounting and made each payment in

full settlement of each statement constitutes an account stated between Ohio and the plaintiffs and may not be challenged by them (R. 156).

Potlatch and Troy were expressly allowed exceptions by the District Court to all findings of fact and conclusions of law (R. 156).

Thereupon the District Court rendered judgment in favor of Ohio for $349.07, its costs and adjudged the plaintiffs take nothing by the suit (R. 157, 158).

Appeal was taken to the United States Court of Appeals for the Ninth Circuit on March 26, 1951, (R. 158), and Potlatch and Inland on July 27, 1951, filed with the said Court of Appeals their statement of points on which they intended to rely on appeal (R. 630-635). Briefs were filed and the matter was argued and submitted April 16, 1952, (R. 639) and the Court of Appeals affirmed the judgment of the District Court October 30, 1952 (R. 661) with written opinion (R. 639). Petition for rehearing filed within time was denied December 2, 1952 (R. 662).

The affirmance of the judgment of the District Court by the Court of Appeals was based upon the grounds the action was barred by the statutes of limitations of Montana and laches (Opinion Court of Appeals, R. 640-661) and that such view of the Court made it unnecessary to consider the other rulings of the trial court specified in appellants assignments (R. 661).

II. JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C. Section 1254, as revised June 25, 1948.

The jurisdiction of the District Court of the United States was invoked under Section 1332 Title 28 United States Codes Annotated, (Title 28 United States Code, section 41 (1), Judicial Code Section 24, as amended) wherein the United States District Court is given jurisdiction over causes between citizens of different states, where the amount in controversy exceeds $3,000.00, exclusive of interest and costs (R. 26, 33).

The appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked under Section 1291 Title 28, United States Codes Annotated (firt paragraph), (Title 28 United States Code, section 225), (Section 128 Judicial Code, as amended) wherein the Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to the United States Supreme Court. No such direct appeal to the said Supreme Court was permissible in this case.

The judgment of the Court of Appeals was rendered October 30, 1952, (R. 661) and the opinion of the Court (R. 640-661) is reported in 199 Fed. (2d) 766. The issuance of the mandate of the Court of Appeals was stayed to and including March 2, 1953, and in the event a petition for a writ of certiorari be docketed in the Supreme Court of the United States on or before said date until after the Supreme Court passes upon said petition.

III. QUESTIONS PRESENTED

Both the Court of Appeals and the District Court erred:

1. In holding that Potlatch and Inland were guilty

of laches barring them from relief as the holding is contrary to the evidence.

2. In holding that Potlatch and Inland are barred from relief by the statutes of limitations of Montana as same is contrary to the evidence.

3. In holding that by reason of the deaths of F. E. Hurley, Vice-President of Ohio and the person who signed, and A. M. Sellery who witnessed the operating agreement between the parties involved in the action, the testimony of T. P. Jones as to what was said and done between he and F. E. Hurley and A. M. Gee, Ohio's attorney, both at and preceding the time of making of the operating agreement was not admissible for any purpose, and in holding no foundation had been made for the testimony and in holding no injustice would be done in excluding it. This excluded testimony as far as pertinent appears in Vol. II of the record pages 413 to 497. Mr. Jones stated substantially:

"I was a trustee, President and Manager of Troy-Sweetgrass Oil Syndicate and in that capacity I signed the written 'Operating Agreement' (Plaintiff's Exhibit 2) with the Ohio Oil Company about June 15, 1922, and the 'Assignment' attached thereo. On that date I met A. M. Sellery, Vice-President of Ohio, and Mr. Gee and F. E. Hurley, who purported to act as attorney for that Company, at the office of Troy-Sweetgrass Oil Syndicate at Shelby, Montana (R. 416-420). At the time of signing the agreement my attention was directed by one of the gentlemen to the part of paragraph 3 thereof which I mark in pencil by parenthesis on the Exhibit and which reads, "but

in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from in or upon said lands" (R. 420-423). On the day the agreement was signed I had a conversation with Mr. Hurley and Mr. Gee wth reference to entering into arrangements for drilling and development of lands of Troy-Sweetgrass Oil Syndicate. Mr. Hurley and Mr. Gee came to my office and Mr. Hurley asked me if I would make an operating agreement on lands they described and I told them I would under my terms, which I told them, but not where any expenses would be charged to this land off of the lease and after conversation of quite awhile Mr. Hurley said the charges wouldn't be in excess probably of ten per cent and I told him if that is all it will be you take 55% and I'll take 45% and you can pay the expenses and put that into a lease and we can make an agreement. Mr. Gee said he would write up that kind of an agreement and would go over and write it up which he did and returned with an operating agreement written up in triplicate, I think. When Mr. Hurley and Mr. Gee first spoke to me about a deal they had some blank forms, fifty-fifty, which they told me was a fifty-fifty operating agreement. Mr. Hurley called it that. I told them I objected to the California a couple of days prior and I objected to theirs. I wouldn't go into that kind of an agreement with anybody. When I outlined to them the kind of a deal that I would go in with them I told them I would be willing to share the expense of drilling wells, putting them into production on the lease, but not a lot of expenses all over the country

which Mr. Hurley said wouldn't amount to much, probably ten per cent and then said, 'all right I will give you five per cent of ours making yours fifty-five per cent and you pay all of the expenses outside of the lease, which would make it ten per cent to pay the outside expenses.' Mr. Gee said he could write up a contract covering that. These expenses was to be just what was on the lease, not off the lease. After this conversation Mr. Gee returned to me a form of operating agreement which I read and objected to (R. 423-432). I told him the objections I made wasn't in there. He said he would go and rewrite it. He went over to his office and came back with some copies rewritten of a proposed form of agreement which I read and he pointed out to me where my objections were covered in it. When he pointed out the paragraph to me he said that covered my objections he said there would be no charges against the company except what was done on their ground. When Mr. Gee made the statement concerning this portion that he had included in the proposed form of operating agreement, Mr. Hurley was present. After Mr. Gee made the statement we signed up the operating agreement, I and Mr. Luke signed it and the Ohio men, Hurley and Sellery (R. 432-433).

"During the years 1923 and 1924 to 1927 I was acquainted with John McFadyen also known as Jack McFadyen. I know L. J. Yealy, first become acquainted with him when he became active in the field. **After the operating agreement was signed the Ohio** Oil Company took possession and started drilling the property. Troy-Sweetgrass nor any of its officers or

agents had anything to do with the active operations on the land. Ohio drilled a number of wells, eight or nine, maybe some more since then. They produced oil in all of the wells drilled by them (R. 436-440). After the Ohio Oil Company discovered oil and the Baker Lease and continued their operations they submitted a writing setting forth items of expense to Troy-Sweetgrass, these writings were supposed to be submitted every month. I read the statements. I discussed with Yealy or Hungerford items appearing in the statements and told them they were charging us for stuff they hadn't ought to and they said take it up with the officials of the company. In the year 1925 we had a meeting at which Mr. Firmin, purporting to act for Ohio Oil Company and Jean Gerlough, Mr. J. W. Freeman, Mr. R. E. Wilson and myself were present and at which meeting we discussed generally overcharges the Ohio had made against us. It was just a meeting of the directors of the various companies and the Ohio representatives. Mr. Firmin requested a written statement of our objections and then we gave our attorney, Mr. Freeman, instructions to furnish him with what he requested. We asked J. W. Freeman, our attorney, to collect the money for these overcharges and we told him to write Mr. Firmin. After the meeting we received a letter purporting to be a copy of the letter which Mr. Freeman said he had written Mr. Firmin. Letter shown me marked plaintiffs' Exhibit 26 for identification, I recognized the letter and showed it to Mr. Gerlough, Mr. Wilson, and I think Mr. Harsh and probably Mr. Hornby, probably the directors of the various companies and

another director of the Inland, Mr. Ball, I think (Plaintiffs' Exhibit 26 is a copy of the same letter as EXHIBIT A attached to the answer of Ohio (R. 65-73). I received from Mr. J. W. Freeman of the firm of Freeman, Thelen and Frary purporting to be a copy of a letter from the Ohio Oil Company in response to the original letter (Plaintiffs' Exhibit 26), which is marked 'Pltfs Ex. 27' (the exhibit is a copy of the letter attached to the answer as EXHIBIT "B", R. 73-89) (R. 440-446).

"I was present at a meeting of the stockholders of Potlatch Oil and Refining Company in the year 1926 and after that I saw Mr. McFadyen at Shelby, Montana, at an oil station just across from the Rainbow Hotel. I went over and talked to him about the operating agreement between the Ohio Oil Company and the Troy-Sweetgrass Oil Syndicate. With respect to the operations I told him if he didn't correct these things and make an accounting we would have to enter a suit against The Ohio Oil Company. He said 'don't start no suit because The Ohio Oil Company is responsible and reliable and eventually in the final account we will fix this up and pay you anything that was overcharged to you'. He said 'I will use my efforts to see that it is brought to a head iwthout suit'. As a result of his statement I didn't start any suit. After this I notified persons connected with Potlatch Oil Company and Troy-Sweetgrass Oil Syndicate, concerning this conversation with Mr. McFadyen, Gerlough, Wilson, Harsh, Ball and Laird. I know I talked with them because they were our directors of my different companies (R. 446-450)."

In cross examination T. P. Jones testimony, in substance, is a repetition of the foregoing testimony (R. 454-501).

The Court of Appeals erred in rendering and entering judgment, (R. 661, 662) affirming the judgment of the District Court in favor of Ohio and against Potlatch and Inland (R. 157, 158) as same is contrary to the law and the evidence in the case.

The District Court erred in holding that Troy, the predecessor in interest of Potlatch and Inland never made any objections to the accounting made to it by Ohio and which included the same items as subsequent statements of account made to Inland and Potlatch (Opinion District Court R. 153) for the reason such determination is not supported by the evidence and the Court of Appeals erred in failing to pass on this assigned error (Opinion R. 661).

The District Court erred (R. 155) in holding the operating agreement was clear and explicit and the intention of the parties must be ascertained from the agreement above and it may not be explained by parol evidence or reference to matters outside the agreement and not recited in the agreement (R. 155), for the reason the said agreement is uncertain as to what items of expense incurred by Ohio should be excluded in accounting to Potlatch and Inland and the Court of Appeals erred in failing to pass on such error of the District Court duly assigned by Potlatch and Inland (Opinion Court of Appeals, R. 661).

The District Court erred (R. 156) in holding that the monthly statements of accounts furnished by Ohio to Troy and Potlatch constitutes an account stated

between them and may not now be challenged (R. 156) and the Court of Appeals erred in failing to pass on such error of the District Court duly assigned by Potlatch and Inland (R. 661 opinion of the Court of Appeals).

IV. REASONS FOR GRANTING THE WRIT

The Court of Appeals held that delay of Potlatch and Inland in instituting the suit for accounting and the intervening deaths of two of the parties who represented Ohio and negotiated the operating agreement involved in this action constituted laches barring relief without giving due consideration to all the other facts and circumstances showing among other things the present existence and testimony of the attorney for Ohio who was present during the negotiations and actually prepared the operating agreement and was a witness for Ohio, the fiduciary relations of the parties, that delay in instituting the action was induced by the request of the General Manager of Ohio in charge of the operations under the agreement to Potlatch and Inland not to institute suit coupled with his promise all errors would be corrected and payment made on a final accounting which would be made by Ohio to Potlatch and Inland, that there was no loss of pertinent records, and the important fact that Ohio received a substantially larger pecuniary benefit from the delay. The Montana Supreme Court in Montgomery v. First Nat. Bank of Dillon 114 Mont. 395, 136 P. 2d 760 and Johnson v. Kaiser et al., 104 Mont. 261, 65 P. 2d 1179, held that delay alone does not constitute laches but all the facts and circumstances in each case must show such a material change

of circumstances with delays of such duration and character to render enforcement of the asserted right inequitable. This Court held in Earle v. Myers, 207 U. S. 244, 52 L. ed 191, that the representative of the estate of a deceased joint adventurer was entitled to relief by way of an accounting against a surviving joint adventurer as death of one of the parties to the joint venture and delay did not constitute laches. These decisions and others cited in the argument represente the weight of authority. The decision of the Court of Appeals in this case conflicts with the weight of authority on a question of general law.

The Court of Appeals held that Potlatch and Inland were barred by the statutes of limitations of Montana because the failure or refusal in the year 1925 of Ohio to pay them for the improper charges set forth in statements rendered after objections made to such charges constituted a repudiation by Ohio of its trust as a joint adventurer in possession of the common property and the statutes of limitation commenced to run against the claims of improper charges in 1925. The Supreme Court of Montana in State v. Rorabeck 111 Mont. 320, 108 P. (2d), held that the statute of limitations did not begin to run against the beneficiary until the trust has been repudiated and notice of the repudiation given the beneficiary and refused to pass on the question of whether nonpayment constituted a repudiation of the trust. Notwithstanding nonpayment Potlatch, Inland and Ohio continued in the relationship of joint adventure until January 31, 1943, when the relation terminated, and the general rule appears to be that a fiduciary at the termination of the

venture is entitled to an accounting from his associates. 1 C. J. S. section 19, P. 655.

The Court of Appeals decided that the testimony of witness, T. P. Jones was inadmissible for any purpose by reason of his having been a party to the operating agreement between Troy and Ohio and F. E. Hurley and A. M. Sellery, representatives of Ohio in negotiating the agreement, having died before trial, under Section 93-701-3 Revised Codes of Montana 1947 which, among other things, provides:

> "The following persons cannot be witnesses:" "4. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communications between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation, except when it appears to the court that without the testimony of the witness injustice will be done."

(Opinion, Court of Appeals, R. 649-651). The Supreme Court of Montana in Sharp v. Sharp, 115 Mont. 35, 139 P. 2d 235 held that, in an action to establish a trust in real estate standing in the name of a deceased brother at time of death, the testimony of plaintiff as to certain declarations of the deceased made to plaintiff admitting he (the deceased) was holding the property in trust, where other evidence in the case tended to establish credibility in the plaintiff's claim and that it is not necessary that such other evidence make out a prima facie case. The decision of the Montana Court and other decisions of that Court cited in petitioners' attached brief is probably

in conflict with the decision of the Court of Appeals.

The Court of Appeals decided, (Court's Opinion R. 649-651) the testimony of T. P. Jones as to a conversation he had with John McFadyen, General Manager of Ohio in charge of operations under the operating agreement, who promised an adjustment and payment of overcharges made by Ohio against Potlatch and Inland upon the final accounting to be made by Ohio, because of the death of John McFadyen prior to trial, was inadmissible under the provisions of above mentioned subdivision 4, section 93-701-3 Revised Codes of Montana 1947. The Supreme Court of Montana decided the above mentioned case of Sharp vs. Sharp, 115 Mont. 35, 139 P. 2d 235, holding death does not necessarily render the witness incompetent which is probably in conflict with the decision of the Court of Appeals.

For these reason it is respectfully submitted that this petition should be granted.

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Of Counsel

The undersigned, counsel for the petitioners named in the foregoing petition, hereby certifies that said petition is well founded and not interposed for delay.

E. J. McDADE
Counsel for Petitioners

In the Supreme Court

OF THE

United States

OCTOBER TERMS, 1952

No. .....

POTLATCH OIL & REFINING COMPANY, a Corporation, and JEAN P. GERLOUGH, STANLEY H. HODGMAN and ROY E. LARSON, as Trustees of That Certain Trust Known as Inland Empire Oil and Gas Syndicate, a Common Law Trust,

Petitioners,

vs.

THE OHIO OIL COMPANY, a Corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION

I. OPINIONS

One opinion was delivered by the District Court, written by District Judge Charles N. Pray and filed February 24, 1951. It appears at page 139 of the record and is reported in 96 Fed. Supp. 685. The opinion of the Court of Appeals, written by Circuit Judge Pope was filed October 30, 1952 and appears at page 640 of the record. It is reported in 199 Fed. (2d) 766.

II. JURISDICTION

The statutory provisions sustaining jurisdiction and the jurisdictional facts are set out in the petition, page 17. The judgement of the District Court appears in the record, pages 157, 158, and is reported in 96 Fed. Supp. 685. The judgment of the Court of Appeals appears in the record, pages 661, 662, and is reported in 199 Fed. (2d) 766.

III. STATEMENT OF THE CASE

The facts are stated in the petition, pages 2 to 17. We emphasize that the District Court and the Court of Appeals decided controlling questions of law which probably conflict with decisions of the Supreme Court of Montana and of the Supreme Court of the United States as will appear from the decisions hereinafter cited in the argument.

IV. ARGUMENT

(a) **Ambiguity and uncertainity in operating agreement may be explained by oral testimony to determine the intent of the parties.**

A copy of this agreement appears in appendix annexed hereto.

Paragraph III (R. 19, 20) of the operating agreement between Troy-Sweetgrass Oil Syndicate, hereinafter referred to as Troy, and the Ohio Oil Company, hereinafter referred to as Ohio, reads:

"III. In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in in as diligent a manner as field and market conditions warrant and as is consistent with good business management. It will pay all cosis and ex-

penses of developing and operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part Forty-five (45%) per cent thereof. Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) per centum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof. The said party of the second part shall be reimbursed by the said party of the first part solely from the first party's proportion of the oil and gas produced and sold from said land. Application from proceeds from sale of said oil and gas will be made to the credit of the first party's account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The party of the second part shall be entitled to and shall charge the party of the first part eight (8%) per centum interest upon all moneys so advanced for the development and operations upon said lands for the account of the interest of the first party's until the same shall have been paid out of the proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production.

Petitioners as successors in interest to Troy in the operating agreement contend the paragraph is amiguous and uncertain and that it was intended and orally understood by the parties at the time of the making of the agreement that the charges and expenses to be borne by Troy were to be limited exclusively to the cost of the wells at their location on the lands except the first well solely to be borne by Ohio and placing the wells in condition to deliver the oil and gas pro-

duction plus the actual cost of equipment and repairs and replacements and installation costs (Complaint R. 6, 7) and that such intent was evidenced by that part of paragraph III which reads, **"but in not case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands"** (emphasis supplied). Ohio contends that under the paragraph it was entitled to charge all expenses incurred whether on or off the land plus 10% of the total for "overhead expenses". (Answer R. 61-65, 89-95). To show that the intent was to limit expenses chargeable witness T. P. Jones, who signed the operating agreement, testified concerning the oral negotiations between the parties at and prior to the signing of the agreement and that it was agreed that the share of expenses to be charged Troy was to be exclusively limited to the expenses for the cost of actual drilling itself of the wells at their locations on the land, except the expense of drilling the first well which was to sole expense of Ohio and the placing of said wells in condition to deliver the oil and gas production, plus the actual cost of the equipment upon the lands and actual cost of installation of said equipment and repairs and replacements of said equipment and that all other costs of operation would be the sole expense of Ohio. The testimony of Jones appears ante at pages 19 to 24 of the petition, to which we respectfully refer. The exclusion of this testimony of T. P. Jones by the trial court was error as the testimony was offered to explain the uncertainty caused by that part of paragraph III of the operating agreement which reads all costs

and expenses of **"developing and operating said lands for oil and gas purposes as herein provided"** and that part of the same paragraph III which provides **"but in no case shall the said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands"** (emphasis supplied). The Court of Appeals likewise erred in failing to reverse the trial courts act in excluding the evidence.

The Operating Agreement was prepared by Mr. Gee, (R. 425, 555, 583) the attorney for Ohio at the time, and since the agreement is ambiguous and uncertain, parol evidence is admissible to show what was said and done at and prior to the signing of it and what the representative of Troy (Jones) understood what it meant and what Ohio believed Troy undestood it to mean at the time.

The testimony of the witness as to the provision of the Operating Agreement, as same was finally written by the attorney for Ohio, which the attorney pointed out as having been inserted for the purpose of limiting the expenses chargable to Troy and to meet Mr. Jones' objections to the "fifty-fifty" form of written agreement and the second form of written agreement theretofore submitted to him by the attorney, Mr. Gee, appears in Jones' deposition, (R. 422, 423, 431, 432, and it appears therefrom that Ohio's attorney particularly pointed out the clause of paragraph III of the Operating Agreement which reads, "but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands." Ohio

retained the forms of agreement objected to by Jones (Jones' Dep. R. 432) and returned the Operating Agreement which was finally signed (R. 432).

The following Montana statutes are pertinent to the question of the admissibility of the Jones testimony

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this chapter."

Sec. 13-705 R.C.M. 1947.

"The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other."

Sec. 13-707 R.C.M. 1947

"A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

Sec. 13-713 R.C.M. 1947.

"For the proper construction of an instrument, the circumstances under which it was made including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose langauage he is to interpret."

Sec. 93-401-17 R.C.M. 1947.

"If the terms of a promise are in any respect ambiguous or uncertain, **it must be interpreted in the sense in which the promissor believed at the time of making it that the promissee understood it.**" (Emphasis supplied).

Sec. 13-715 R.C.M. 1947.

In Brown et al. v. Homestake Exploration Corporation et al. 98 Mont. 305, 39 Pac. (2d) 168 the Supreme Court of Montana held that a written agreement for development and operation of lands for oil and gas which contained a provision for drilling if exploratory

wells **"to such number and extent as the premises will admit of"** (emphasis supplied) was ambiguous as to the number of wells to be drilled and that parol evidence of what was said and done by parties in the preliminary negotiations concerning the number of wells to be drilled was admissible to show what the intent of the parties was at the time of making the agreement. The Montana Court reviewed at length its prior decisions on the admissibility of oral testimony to explain ambiguity or uncertainty in a written agreement.

We respectfully request the Court to observe the language of this paragraph III as to the scope of the statements as being limited to the **"actual cost and expenses of developing and operating said lands and leases"** and that no provision is made for overhead or expenses elsewhere than on the lease and no provision for marketing expense.

Ohio actually is entitled to reimbursement from Troy and which language and expressions express varying concepts of expenses there is presented a clear case of ambiguity and uncertainty in the Operating Agreement as to the intention of the parties as to expenses chargeable against Troy.

We submit the decisions of the Distrcit Court and of the Court of Appeals probably conflicts with the decisions of the Montana Supreme Court in Brown et al. v. Homestake Exploration Corporation et al., 98 Mont. 305, 39 Pac. (2d) 168, and the decisions reviewed in the cited case.

(b) **The deaths of F. E. Hurley and A. M. Sellery two of Ohio's representatives in negotiating the oper-**

ating agreement did not render the testimony of Jones, who represented Troy, inadmissible under the Montana "dead man's" statute.

Further objection to Jones testimony was it violated the statutes of Montana.

Section 93-701-2 R.C.M. 1947, provides:

> "All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section 10508."

Section 93-701-3, R.C.M. 1947, in so far as pertinent provides:

> "The following persons cannot be witnesses: * * * 4. Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communications between the proposed witness and the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation, except when it appears to the court that without the testimony of the witness injustice will be done."

The section excludes as witness only "parties or assignors of parties to an action or proceeding or persons in whose behalf an action is prosecuted" against the defendant corporation as to facts of direct transactions or oral communications between the proposed witness and the deceased officer or agent of the corporation.

Jones is neither a party nor an assignor of a party to the action nor a person in whose behalf the action is prosecuted.

The parties to the action are Gerlough, Hodgman, and Larson, Trustees of Inland, maintaining the action in behalf of the trust estate, and Potlatch, a corporation, maintaining the action in its own behalf.

The Supreme Court of Montana has construed the statute repeatedly and held testimony as to transactions with a deceased person is admissible where sufficient other evidence in the case indicates probable merit in the claim.

In Sharp v. Sharp, 115 Mont. 35, 139 Pac. (2d) 235, the Montana Supreme Court in affirming the trial courts admission of oral testimony as to statements and declarations of a deceased person reviewed its past decisions and held under the statute that the foundational evidence should reasonably indicate that there is merit in plaintiff's claim, before admitting testimony of the statements or declarations of the deceased. The Court held that it appearing inter alia, that from the purchase of the land involved the plaintiff and the deceased operated the property, sharing the profits equally, that plaintiff hired help for the place, and other acts indicating some sort of a joint ownership, aside from the facts testified to by plaintiff and disputed by defendant administratrixs, that in a conversation between plaintiff and the deceased at which defendant was present relating to placing of title in the defendant the defendant agreed to a reconveyance anytime requested, was sufficient to warrant the ruling of the trial court.

In the case of Ahlquist v. Pinski, excutor, 120 Mont. 355, 185 Pac. (2d) 293 the Montana Supreme Court held the oral evidence of declarations of the deceased which were necessary to establish the plaintiff's case was admissible.

In the instant case the Court is confronted with the interpretation of the agreement and is entitled under the statute (Sec. 93-401-17 to be placed in the position of the parties at the time the agreement was made to determine what the intent of the parties was. Unless the testimony of Jones is admitted as to the facts existing at the time, the Court in construing the agreement might interpret the agreement contrary to the true intent of the parties. Particularly where there is other evidence in record corroborative of the claim of plaintiffs, but insufficient without the evidence objected to establish plaintiffs' claim as stated by the Montana Supreme Court in Wunderlich v. Holt, 86 Mont. 260, 283 Pac. 423.

It is not necessary that the oral testimony be sufficient in itself to show prima facie the right to relief as held by the Montana Supreme Court in Rowe v. Eggum, 107 Mont. 378, 87 Pac (2d) 189.

The decisions of the Court of Appeals and of the District Court in this case probably conflict with the foregoing decisions of the Montana Supreme Court.

(c) **The death of John McFadyen, General Manager in charge of operations under the agreement did not render inadmissible the testimony of T. P. Jones to the effect that John McFadyen promised a correct accounting and payment upon a final accounting to be made by Ohio when Jones complained to him in 1926**

about improper charges made by Ohio and by reason of the request by McFadyen not to start suit the commencement of present suit was delayed.

The testimony of Jones relative to his conversation with McFadyen rejected by the lower courts in this case and set out ante at page 23 of the petition is substantially that Jones met McFadyen and informed him that if the matter of the improper charges against Potlatch and Inland was not corrected he was going to bring suit against Ohio; that McFadyen said not to start suit because Ohio was responsible and reliable and eventually "we will fix this up and pay you anything that was overcharged to you" and Jones communicated the fact of the conversation to the directors of his companies and as a result no suit was started **(R. 447-449). We believe the evidence of Jones was** admissible under the rule of the Montana decisions in the preceding subdivision "(c)" hereof in view of the other evidence in the case showing the making of the operating agreement, the turning over of exclusive possession to Ohio, the oral and written objections to Ohio to charges as improper, the conduct of Potlatch and Inland in not starting suit, the fiduciary relationship of joint adventurers between Potlatch, Inland and Ohio during all of the period Ohio operated the properties, all are facts indicating the probable merit of petitioners' claim.

(d) **Neither laches nor statutes of limitations bar the claims of Potlatch and Ohio.**

Petitioners and respondent were joint adventurers and also tenants in common of the Baker Lease.

Section 67-312 R.C.M. 1947 defines an interest in common to be:

"An interest in common is one owned by several persons not in joint ownership or partnership."

Hochsprung v. Stevenson,
82 Mont. 222, 237, 266 Pac. 406.

Section 67-313 R.C.M. 1947, defines what interests are in common as follows: "Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common unless acquired by them in partnership for partnership purposes or unless declared in its creation to be a joint interest, as provided in Section 67-308 R.C.M. 1947.

A joint adventure is broadly defined as an "enterprise undertaken by several persons jointly, and more particularly as an association of two or more persons to carry out a single business enterprise for profit, or as a special combination of persons undertaking jointly some specific adventure for profit, without any actual partnership or corporate designation, or an association of persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge."

Rae v. Cameron
112 Mont. 159, 114, Pac. (2) 1060.

In Ivins v. Hardy 120 Mont. 35, 179 Pac. (2) 745, the Court held that where two persons jointly purchased land and engaged in the ranching and livestock business for profit, each to share certain portions of the expenses of the operation, such persons were tenants in common of the land and joint adventurers in the operation of the ranches and the plaintiff, and

one of the joint tenants, was entitled to an accounting from the other tenant. The Court said: "The joint venture between the parties was but the natural dealing between tenants in common for the development and use of the common properties under a plan mutually beneficial to the tenants in common," citing Dunham v. Loverock, 158 Pa., 197, 27 Atl. 990. Referring to the cited case the Court said: "There tenants in common entered into an agreement to drill an iol well on their land." A dispute arose over the cost of the well, one tenant in common claiming a balance due from the other and claiming the existence of a partnership. The Court pointed out that the agreement claimed to be a partnership "was an undertaking which was appropriate to tenants in common, since it would increase the product of the common property." The Court further said, "To be sure, there was undivided possession of the lease, but unity of possession is one of the distinguishing characteristics of a tenancy in common. There was contribution to the cost of operating the well or wells, but this could be compelled between tenants in common by bill or account render. There was division of the product, but this was in accordance with the rights of the cotenants. Each had a right to share in the product in proportion to his interest in the estate."

See also: Snider v. Carmichael,
102 Mont. 387, 58 Pac. (2) 1004.

The situation between the parties in this case is similar to the situation of the parties in the above cited cases.

The relation between joint adventurers is fiduciary

and each have the right to demand and expect from their associates utmost good faith and scrupulous honesty in all that relates to their common interests, and each is forbidden to so act that his personal interest would be hostile to the other. The relationship is in the nature of trusteeship.

Dexter & Carpenter, Inc. v. Houston,
(1927 C.C.A. 4th) 20 Fed. (2) 647.

Where through breach of fiduciary duty a joint adventurer acquires more than his proper share under the agreement, he will be deemed a trustee for the benefit of his co-adventurer.

3 Bogert Trusts and Trustees,
Sec. 488, pp 127-130,

Wiley v. Wirbelauer,
116 N. J. Eq. 391, 174 Atl. 20.

Under the operating agreement Ohio, by reason of the confidence reposed by Troy, was given possession and control of the lands involved, and of the development and operation upon the lands of the oil produced and of the proceeds from the sale of the production. As a fiduciary it occupied a relation of trusteeship, owing the duty to correctly and honestly account to and deliver to Troy, Inland and Potlatch, respectively, their just share of such proceeds; and the burden at all times rested upon Ohio to show that it has performed its trust and the manner of its performance in detail.

Wooton Land & Fuel Co. v. Ownbey,
265 Fed. 91,
Dexter & Carpenter, Inc. v. Houston,
(C.C.A. 4th) 20 Fed. (2) 647,
1 C.J.S. Section 39, p. 679.

Ohio is charged with failure to pay over to plaintiffs

a portion of their rightful share of the proceeds from sales of oil and retain such proceeds notwithstanding demands made for a correct accounting for such proceeds and payment thereof. Under such circumstances plaintiffs are entitled to maintain the present action for an accounting.

Kilbourn v. Sunderland,
130 U. S. 505, 32 L. ed. 1005

The testimony of Jones, Wilson and Gerlough and correspondence (Plaintiffs' Exhibit "O" R. 303-368) show objections being made for improper debits and lack of proper credits to plaintiffs through the years. The letter from Attorneys Freeman, Thelen and Frary to Ohio, (R. 65-73) setting forth objections to correctness of the statements rendered, the testimony of Jones as to the intent of the agreement and its violation, and the express promise of Mr. McFedyen, manager, that all errors would be finally corrected at the time he requested Jones not to bring suit, Jones' compliance (R. 447-449) and then the sale made by Ohio to Texas, without notice of any kind to Inland or Potlatch (R. 229-230), disclose a situation where Ohio breached its trust and entitles plaintiffs to a correct and honest accounting by Ohio, (Cases cited ante pp. 43 to 45).

Every person who voluntarily assumes a relation of personal confidence to another is deemed a trustee within the provisions of Chapter 144, Revised Codes of Montana, 1935.

Sec. 86-205 R.C.M. 1947.

In all matters connected with his trust a trustee is bound to act in the highest good faith and may not

obtain any advantage therein over his beneficiary by the slightest adverse pressure of any kind.

Sec. 86-301 R.C.M. 1947.

Every violation of the provisions of the preceding sections is a fraud against the beneficiary of the trust.

Sec. 86-307 R.C.M. 1947.

One who gains a thing by fraud, mistake, the violation of a truste, or other wrongful act, is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

Sec. 86-210 R.C.M. 1947.

Obviously by virtue of the Operating Agreement and the above provisions of the statutes the defendant was a joint adventurer and chargeable as a trustee.

Under the laws of Montana and other jurisdictions neither the defense of the statute of limitations nor of laches is available to a joint adventurer or a trustee in an action brought by a joint adventurer or beneficiary for an accounting until after termination of the joint venture or the trust or the repudiation of the truste by the trustees.

Opp. v. Boggs,
Mont. 193 Pac. (2) 379, 121 Mont. 131,

State v. Rorabeck,
111 Mont. 320, 325 108 Pac. (2) 801,

General Pet. Corp. v. Dougherty,
(C.C.A. 9th) 117 Fed. (2), 529, 540.

In case of a technical trust the statute of limitations does not run between the trustee and cestui que trust as long as the trust subsists, the possession of the trustee being the possession of the cestui que trust.

53 C. J. S. subd. 9, pp. 954, 955.

State v. Rorabeck,
111 Mont. 320, 108 Pac. (2) 801.

Ohio at no time repudiated the agreement but continued thereunder to January 31, 1943, receiving its benefits and the profits on the operation besides the 8% interest profit charged under the contract against Troy and successors. Having received the benefits of the agreement, it equitably should bear the burdens incident thereto.

Sec. 49-113 R.C.M. 1947.

Defendant's second and third affirmative defenses plead the five year and eight year statutes of limitations, which refer to sections 93-2604 and 93-2603 R.C.M. 1947. In view of the decisions heretofore cited (ante p 46) to the effect that between joint adventurers the statute does not commence to run until the termination of the joint venture and as to a trustee and beneficiary the statute does not commence until there is a clear repudiation of the trust by the trustee and such fact brought to the knowledge of the beneficiary, the statutes have not barred the action. Ohio retained sole possession and control of the lands and operated under the agreement until January 31, 1943. Assuming, for argument only, the sale at that time to Texas Co. constituted a repudiation of the trust by Ohio and also constituted a termination of the agreement as to plaintiffs, neither the five year statute nor the eight year statute bars the action since this suit was started in March, 1947, or within four years and forty-six days from the date of sale and within about four years after plaintiffs received notice of the sale to the Texas Co. when in March, 1943, they re-

ceived statements from the Texas Co. covering operations for the month of February, 1943. (R. 229-230, Gerlough.)

Adverting to the question of laches, the answer of defendant fails to allege facts constituting laches on the part of the plaintiffs. The allegations of the answer are substantially that F. E. Hurley died July 27, 1928, and A. M. Sellery died February 14, 1927, and plaintiffs did not commence this suit until March 18, 1947. These facts do not constitute laches. The Montana and Federal Courts are in accord that where an action is commenced with the period of the statute of limitations, prejudice will not be presumed and that the party asserting laches must show substantial prejudice which prevents justice being done.

Johnson v. Kaiser, et al,
104 Mont. 261, 65 Pac. (2) 1179,

Cox v. Hall,
54 Mont. 154, 168 Pac. 519,

Brundy v. Canby,
50 Mont. 454, 148 Pac. 315,

Parchen v. Chessman,
49 M. 326, 143 Pac. 631.

Apparently defendant erroneously concludes that the death of Messrs. Sellery, Hurley and MacFadyen were sufficient to establish laches. Such is not the rule.

Earle, Admr. v. Myers,
207 U. S. 244, 52 L. ed. 191,

Townsend v. Van der Werker,
160 U. S. 171, 40 L. ed, 383,

Nave-McCord Mercantile Co. v. Ranney,
(C.C.A. 8th, 1928) 29 Fed. (2) 383,

Oswald v. Camac,
(C.C.A. 5th, 1933) 65 Fed. (2) 610,

Consolidated Placers v. Grant,
(N.M.) 151 Pac. (2) 48.

Earle v. Myers (supra, 207 U. S. 244, 52 L. ed. 191) was an action by the administrator of the estate of a deceased joint adventurer against the surviving co-adventurer for an accounting for his share of the profits arising out of the venture being withheld by the survivor. Defense of laches interposed based on long lapse of time and the death of a party to the joint adventure agreement. The United States Supreme Court held that the delay and death of the party did not constitute laches. Accounting allowed

In Townsend v. Van der Werker, 160 U. S. 171, 40 L. ed. 383, the Supreme Court held that the death of a party to an agreement whereby her testimony was lost was not conclusive of laches in an action to establish and enforce a trust and for accounting. The Court (40 L. ed. 387) said: "The delay is sufficiently accounted for by the intimate personal relations that had always existed between plaintiff and Mrs. Marvin and the unlimited confidence he had reposed in her." In addition to the confidential relations existing between plaintiff and the deceased she had promised the plaintiff she would make settlement of the existing matters between them and by reason thereof, plaintiff neglected to bring suit in her lifetime. The Court held that the same diligence could not be expected of plaintiff under such circumstances as would have been required if the plantiff had been dealing with a stranger.

In Nave-McCord Merc. Co. v. Ranney, 29 Fed (2) 383, an action was brought for enforcement of a

trust and accounting for value of good will on a sale of assets by the officers of a corporation to another corporation in which such persons were also officers. There was a delay of over twenty-four years from the time of sale in the commencement of the action. During the interin some of the parties to the original transaction had died. In denying the defense of laches and adverting to the fiduciary relations existing between the parties the Court held that laches is dependent upon the circumstances in each case and the doctrine is to assist justice, not defeat it. The Court said (29 Fed. (2) p. 391):

> "It is, of course, unfortunate that the men who were the most concerned with this matter, and who could have testified of their own knowledge as to what was said and what was done, have nearly all pased from the scene; but that is a matter to be considered in weighing the evidence and determining the facts. Townsend v. Vanderwerker, 160 U. S. 171, 16 S. Ct. 258, 40 L. Ed. 383. The trial court was right in holding that the doctrine of laches should not be invoked in this case."

The case of Oswald v. Camax, 65 Fed. (2) 610 was for an accounting brought by a surviving joint adventurer against the executrix of the will and widow of a deceased co-adventurer to recover a share of the profits of the enterprise withheld by the deceased. The Court held that the death of the co-adventurer did not establish laches and particularly so in the case, since records of the joint account of the parties were available and the statute of limitations had not run. Accounting held proper remedy.

In Brooks v. Clintsman, 98 S. E. 742, the Supreme Court of Virginia held that the death of a party does

not constitute laches even though such party was the one who perpetrated the fraud by changing the name of the grantee in a deed.

Neither the pleadings nor the evidence support defendant's plea of laches.

On the contrary, the delay has benefited the defendant. It has had the use of the money represented through the years of the operation, although the plaintiffs were charged 8% interest on proper and improper charges, both, by Ohio until their share of the production paid the amount of such charges.

In view of the foregoing promise of the general manager, Mr. McFayden, the plantiffs' delay in suing is excused and defendant is estopped to assert defense of laches and the statutes of limitations.

The pertinent principles are stated as follows:

Matters of explanation or excuse for delay in maintaining suit in equity vary, such as a promise to satisfy the complainant's claim, an intimate or confidential relations between the complainant and the person whose conduct gave rise to the claim, and delay caused by the Defendant's conduct or that delay is attributable to the acts of Defendant.

19 Am. Jur., Sec. 503, p. 348.

It is established by the overwhelming weight of authority that the equitable doctrine of estoppel in pais is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations, and that a debtor may by his representations, promises or conduct, be estopped to assert the statute where the elements of estoppel are present. Concisely stated, parties may by their words or conduct estop themsel-

ves from pleading limitations. The doctrine of estoppel to rely on the defense of limitations is entirely independent of statutes by providing for the suspension of the statute by an acknowledgment or new promise, and will not be applied except where it would be inequitable to refuse to apply it.

34 Am. Jur. Sec. 411, pp. 323, 324.

A request not to sue, however, when coupled with other circumstances such as a promise to pay the claim or a promise not to plead the statute of limitations, estops the debtor to set up the statute.

34 Am. Jur. Sec. 419, p. 331.

Matters of explanation or excuse for delay in maintaining suit in equity vary, such as a promise to satisfy the complainant's claim, an intimate or confidential relation between the complainant and the person whose conduct gave rise to the claim or that delay is attributable to the acts of Defendant.

19 Am. Jur. Sec. 503, p. 348.

Duncan v. Dazey,
(Ill. 1925) 149 N. E. 495.

In Dexter & Carpenter, Inc. v. Houston, 20 F (2) 647 (C.C.A. 4th), an action for accounting between joint adventurers, the court held the obligation of utmost good faith and scrupulous honesty between point adventurers within the scope of the enterprise is in the nature of a trusteeship and that where a promise to make an adjustment of the claim was made by defendant to plaintiff and he failed to do so he may not rely upon the defense of laches since he held out a promise that was not fulfilled and which was accepted by the plaintiff.

(e) No account stated was had between the parties to defeat the action.

Ohio substantially charges that because monthly statements were furnished by Ohio to plaintiff and their predecessor and payments made to plaintiffs respectively when a credit balance was shown, such rendition of statements and retention of monies resulted in an account stated each month by the plaintiffs, respectively, and their predecessor in interest, and by reason thereof plaintiffs are estopped to maintain this action. (Defendant's Fourth Affirmative Defense, Answer) (R. 59-65).)

This defense is wholly without support by the evidence. The answer admits that prior to August 5, 1925, plaintiffs made protests and objections to certain charges contained in the monthly statements. He is an express admission by defendants that objections had been made by plaintiffs to "certain charges" in the statements corroborating the testimony of Jones, Wilson, (above) to such effect. (Answer, par. IX, (R. 55, Complaint, par XIII, R. 13, 14).)

Although the answer alleges that no objections concerning the correctness of the statements were made by plaintiffs after the correspondence between the attorneys for plaintiffs and Ohio (Firmin) the correspondence submitted with Wilson deposition (R. 546-549), and in part duplicated in plaintiffs' Exhibit "O" (R. 304-368) show many objections by plaintiffs, respectively, to correctness of statements and acknowledgment of errors by defendant and promised corrections.

An account stated is an agreement between the

parties, express or implied, that all items are correct which agreement has the force of a contract. Where assent to correctness is to be implied from retention of statements, **the statements must have been retained an unreasonable** length of time **without objection.**

Baldwin v. Silver,
58 Mont. 495, 193 Pac. 750,

O'Hanlon v. Jess,
58 Mont. 417, 193 Pac. 65, 14 A. L. R. 237,

It is not an account stated if the evidence shows that the party to whom rendered objected to the correctness of the account or previous protests had gone unheeded.

1 C. J. S. 37, p. 716.

Nor is it an account stated where **the parties do not treat it as a final adjustment.**

1 C. J. S. Sec. 38, p. 717.

Any fact tending to negative assent to the statement of account may be shown rebut the presumption of correctness of the account by retention such as showing that the determination of the correctness of the account would be had at a later date.

1 C. J. S. Sec. 37, p. 716.

To constitute an account stated each party must understand the transaction as a final adjustment of respective demands.

Stearns Co. vs. U. S.

291 U. S. 54, 78 L. ed. 647,
1 Am. Jur., Sec. 23, p. 277.

The act that payments accompanying the statements are retained is not conclusive evidence of an account stated.

Hanson v. Fresno Jersey Dairy Co.,
(Calif. Sup. C't) 31 Pac. (2) 359,
Jensen v. Cloud,
107 Mont. 593, 88 Pac. (2) 36.

Under the rules of the preceding authorities cited, it is necessary that in order to constitute an account stated there must be an intention to strike a balance between the parties and that the parties intend such balance to be a final settlement of the transactions to which they relate, and that any evidence tending to show that same was not intended to be such final adjustment by the parties is admissible in determining whether an account was stated by the parties.

The record in this action establishes that:

(a) Troy, Inland, Potlatch, and Ohio, during the period of operations under the Operating Agreement, were respectively, fiduciaries, as joint adventurers.

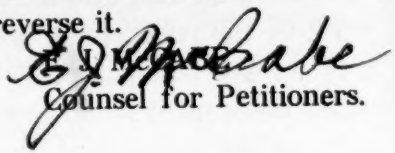
(b) Ohio obtained properties and monies in which the parties had interests under the Operating Agreement;

(c) Ohio is charged with failure to correctly account and pay over the shares of the monies which plaintiffs claim and that demanded for full final accounting therefor has been made by plaintiffs, and Ohio has failed to so account;

(d) The evidence shows generally prima facie improper charges made by Ohio, failure to give correct credit for the prevailing market price of oil at the wells, and that an accounting is proper and necessary to determine the amount owing to the plaintiffs.

It is respectfully submitted that the judgments of the District Court and of the United States Court of

Appeals should be reversed and that to such end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals and finally reverse it.



Counsel for Petitioners.

E. J. McCABE, Jr.
Of Counsel.

APPENDIX

Operating Agreement

This Agreement, made and entered into this fifteenth day of June, A.D. 1922, by and between the Troy-Sweetgrass Oil Syndicate, a common law trust, of Shelby, Montana, County of Toole, State of Montana, hereinafter called the party of the first part, and the Ohio Oil Company, an Ohio corporation, of Findlay, Ohio, hereinafter called the party of the second part, Witnesseth:

That, Whereas, the said party of the first part in pursuance of a prior verbal agreement did on this date sell, assign, transfer and convey unto the said party of the second part, its successors or assigns, an undivided Fifty-five (55%) per centum interest in and to the oil and gas leases covering the following described lands, to wit:

West half (W½) of Section thirty-three (33), and East half of East half (E½E½) of Section twenty-eight (28), West half of West half (W½W½), northeast quarter of southwest quarter (NE¼ SW¼), North half of Southeast quarter (N½ (SE¼), and southeast quarter of southeast quarter (SE¼SE½) of Section twenty-seven (27), and west half of southwest quarter (W½SW¼) of Section twenty-six (26), all in Township thirty-six (36) north, Range two (2) west, M. M., and North half (N½) of Section one (1), and Southwest quarter (SW¼) of Section three (3), and Southeast quarter (SE¼) of Section four (4), being situate in Township thirty-five (35) North, Range Two (2) west, of M. M., and all above described lands situate in Toole County, State of Montana, and containing fifteen hundred and twenty (1520) acres, more or less, and,

Whereas, the party of the first part is desirous of

having the party of the second part develop and operate said premises for oil and gas purposes, and,

Whereas, the parties hereto desire to reduce to writing the terms and conditions of their understanding or agreement,

Now, Therefore, in consideration of the premises and one dollar by each of the parties hereto to the other in hand paid, the receipt of which is hereby acknowledged, and of the covenants and stipulations hereinafter contained, to be duly kept, paid and performed by the parties hereto, it is hereby mutually agreed:

I. The party of the second part shall have the control and management of the said lands and leases and of the development and operation thereof for oil and gas purposes, including the marketing of the oil and gas produced.

II. As a consideration for the assignment hereinabove mentioned, the party of the second part agrees that it will commence the drilling of a well within thirty days from the date hereof upo nthe above described lands and at such location as shall be selected by the party of the second part and will continue said work in a diligent and workmanlike manner to such a depth as shall be deemed an adequate test of the oil and gas content of the first commercial oil sand, in compliance with the terms and conditions of the leases of the party of the first part. It is further agreed that said well shall be drilled free of all cost and expense to the party of the first part, and in the event the said first well shall be termed a failure and of no commercial value and the second party de-

sires to surrender the lease or leases it is understood and agreed that the party of the first party shall have no right or title whatsoever in or to any material, tools or equipment of any kind that has or have been furnished by the second party for the drilling of such well.

III. In the event that the well described in paragraph two herein above shall prove a commercial well, the party of the second part shall continue the work of developing and operating said premises in as diligent a manner as field and market conditions warrant and as is consistent with good business management. It will pay all costs and expenses of developing and (13) operating said lands for oil and gas purposes, as herein provided, and shall charge the said party of the first part Forty-five (45%) per cent thereof. Second party shall market all oil and gas produced upon said land and account to the party of the first part for the undivided Forty-five (45%) per centum of the proceeds thereof at the prevailing market price at the wells for said oil and gas after deducting all royalty oil and gas or the proceeds thereof. The said party of the second part shall be reimbursed by the said party of the first part solely from the first party's proportion of the oil and gas produced and sold from said land. Application from proceeds from sale of said oil and gas will be made to the credit of the first party's account upon the first day of the month following that in which said oil and gas is sold, but in no case shall said party of the first part be finally held or charged beyond its share or interest in the production and equipment from, in or upon said lands. The

party of the second part shall be entitled to and shall charge the party of the first part eight (8) per centum interest upon all moneys so advanced for the development and operations upon said lands for the account of the interest of the first aprty's until the same shall have been paid out o fthe proceeds of the party of first part's proportion of the oil and gas produced and sold as herein provided, said interest payments to be also paid out of production.

IV. The party of the second part hereby agrees to render the party of the first part monthly statements showing the actual cost and expenses of developing and operating said lands and leases and will remit monthly to the party of the first part all proceeds of the oil and gas sold from the interest of the first party over and above the amount necessary to reimburse the party of the second part for expenditures made by it for the account and interest of the party of the first part.

V. The party of the first part through its duly authorized agents or representatives shall at all reasonable times have access to the buildings, lands and property hereinabove for the purpose of examining the operations thereon and the production therefrom, and at all reasonable times during business hours shall have the right to examine the books and records of the party of the second part insofar as they pertain to the operations conducted under this agreement.

VI. The party of the first part hereby gives and grants unto the party of the second part upon the considerations aforesaid the first right and option to purchase the interest of the first party in the lands

and lease above described under and by virtue of the terms of this agreement should the first party at any time desire to dispose of its said interest.

VII. The party of the second part shall fully comply with all the terms and provisions contained in the leases hereinabove described unless and until surrendered unto the party of the first part, but shall have the right, however, upon the payment of One Dollar to the party of the first part, to surrender the whole or any part of the above described leases and lands embraced and included therein, and shall thereafter be relieved by said party of the first part from any further liabilities as to any such lands surrendered.

The terms and conditions of this agreement shall extend to and be binding upon the heirs, administrators, successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have caused this instrument to be executed the day and year first above written.

Witness:
A. M. SELLERY.
Witness:
A. M. SELLERY.
(Seal)
TROY-SWEETGRASS OIL SYNDICATE,
By T. P. JONES,
President,
Attest:
KENNETH G. LUKE,
Secretary,
Party of the first part.
(Seal)
THE OHIO OIL COMPANY,
By F. E. HURLEY,
Vice-President,
Attest:
.....,
Secretary,
Party of second part. (14)

Assignment

Know All Men by These Presents, The Troy-Sweetgrass Oil Syndicate, a common law trust, of Shelby, Montana, for and in consideration of the sum of One Dollar to it in hand paid, receipt of which is hereby acknowledged, does hereby sell, assign, transfer, quitclaim, convey and confirm unto The Ohio Oil Company, a corporation, of Findlay, Ohio, its successors and assigns, an undivided fifty-five (55%) per centum interest in and to the following described oil and gas leases and lands, to wit:

1. A certain oil and gas lease made and entered into on June 16, A.D. 1920, by and between Frank McMahan, party of the first part ,and Thomas D. Brown, party of the second part, covering the West half of the Southwest Quarter (W½SW¼) of Section Twenty-six (26), Township Thirty-six (36) north, Range Two (2) west, M.M., the East half of Southeast quarter (E½SE¼), the Northwest quarter of the Southeast quarter (NW¼SE¼), and the Northeast quarter of the Southwest quarter (NE¼SW¼) of Section Twenty-seven (27), Township Thirty-six (36) North, Range Two (2) West, M.M., Toole County, Montana, containing two hundred and forty (240) acres, more or less.

2. A certain oil and gas lease made and entered into on June 7, A.D. 1920, by and between Mrs. Cora Phillips, party of the first part, and Thomas D. Brown, party of the second part, covering the West half of West half (W½W½) of Section Twenty-seven (27), and the East half of the East half (E½ E½) of Section Twenty-eight (28), all in Township Thirty-six (36) north, Range Two (2) west, Toole County, Montana, containing three hundred and twenty (320) acres, more or less;

3. A certain oil and gas lease made and entered into April 29, A.D. 1922, by and between Israel Sin- first part, and the Potlatch Oil and Refining Com- don and Sophia Sindon (his wife), parties of the pany, party of the second part, covering the North half (N½) of Section One (1), Township Thirty- County, Montana, covering three hundred and five (35) north, Range Two (2) west, M.M., Toole twenty (320) acres, more or less;

4. A certain oil and gas lease made and entered into April 27, 1931, by and between Irving H. Baker, a single man, party of the first part, and the Troy-Sweetgrass Oil Syndicate, party of the second part, covering the Southwest quarter (SW¼) of Section Three (3) and the Southeast quarter of Section Four (4), all in Township Thirty-five (35) north, Range Two (2) west, M.M., Toole County, Montana,

containing three hundred and twenty (320) acres, more or less;

5. A certain Warranty Deed made and entered into on April 17, 1922, by and between Thomas Hamsen Anderson, a single man, party of the first part, and The Troy-Sweetgrass Oil Syndicate, a common law trust, party of the second part, covering the West half (W½) of Section Thirty-three (33), situate in Township Thirty-six (36) north, Range Two (2) west, of the M.M., Toole County, Montana, containing three hundred and twenty (320) acres, more or less.

To Have and to Hold, the said undivided fifty-five (55%) per centum interest in and to the foregoing oil and gas leases and lands unto said The Ohio Oil Company, its successors and assigns forever, for the purpose of developing and operating said lands for oil and gas purposes, but subject nevertheless to all the terms and conditions as set forth therein.

TROY-SWEETGRASS OIL SYNDICATE,
By T. P. JONES,
President.

Attest:

KENNETH G. LUKE,
Secretary.

(Seal)

Witness:

A. M. SELLERY.